

1 MAYER BROWN LLP
John Nadolenco (SBN 181128)
2 350 South Grand Avenue
25th Floor
3 Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
4 jnadolenco@mayerbrown.com

5 Lauren R. Goldman (*pro hac vice*)
1221 Avenue of the Americas
6 New York, NY 10020
Telephone: (212) 506-2647
7 lrgoldman@mayerbrown.com

8 Archis A. Parasharami (*pro hac vice*)
1999 K Street, N.W.
9 Washington, D.C. 20006-1101
Telephone: (202) 263-3328
10 aparasharami@mayerbrown.com

11 *Counsel for Defendant Facebook, Inc.*

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

17
18 THIS DOCUMENT RELATES TO:
19 ALL ACTIONS
20
21
22

Master Docket No.: 3:15-CV-03747-JD

**DEFENDANT FACEBOOK, INC.'S
REPLY IN SUPPORT OF MOTION TO
DISMISS**

Date: December 16, 2015
Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

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1 Plaintiffs’ opposition serves only to confirm that these cases should be dismissed.
 2 Plaintiffs do not deny that by signing up for and using Facebook, they agreed to be bound by its
 3 terms of service, which provide that California law—not Illinois law—governs their disputes
 4 with Facebook. Nor do plaintiffs have any response to the numerous Illinois cases that have
 5 enforced such clauses even where the effect is to preclude Illinois residents from asserting
 6 Illinois statutory claims.

7 Even if plaintiffs could bring a claim under Illinois law, they cannot state a claim under
 8 the Biometric Information Privacy Act (“BIPA”). Plaintiffs concede (as they must) that
 9 “photographs are not biometric *identifiers*” under the statute. Opp. 11. They concede (as they
 10 must) that “information derived from photographs is not biometric *information*” under the
 11 statute. *Id.* And they concede (as they must) that their challenge to Tag Suggestions—a simple
 12 and optional feature that is designed to help people find and tag their friends in photos—is
 13 wholly based on information derived from photographs. Compl. ¶ 4. Yet plaintiffs insist that if
 14 the Court reads the statute “as a whole,” it will conclude that the very material *explicitly*
 15 excluded from the statute—information derived from photographs—is *implicitly* regulated under
 16 the rubric “scan of hand or face geometry.” The Court should reject plaintiffs’ attempt to force a
 17 square peg into a round hole and dismiss their claims with prejudice.

18 ARGUMENT

19 **I. PLAINTIFFS CANNOT PURSUE A CLAIM UNDER THE ILLINOIS BIPA** 20 **BECAUSE THEY AGREED THAT CALIFORNIA LAW GOVERNS THEIR** 21 **DISPUTES WITH FACEBOOK.**

22 **A. Plaintiffs Are Bound By Facebook’s Terms.**

23 **1. Plaintiffs Accepted Facebook’s Terms.**

24 Shortly after these cases were filed in Illinois, Facebook moved for a transfer of venue to
 25 this Court, invoking the forum-selection clause in the terms (the Statement of Rights and
 26 Responsibilities (“SRR”)) that govern Facebook’s relationship with the people who use its free
 27 service. Facebook showed that each of the plaintiffs—like everyone else who uses Facebook—
 28 affirmatively agreed to Facebook’s terms as a condition of creating his account; that Facebook
 provided email notice of the most recent changes to those terms; and that the SRR—hyperlinked

on virtually every page of the service—expressly states that “continued use” of Facebook constitutes acceptance of the terms. *See* Dkt. No. 21, at 2–3; RJN Ex. 1 (“Jordan Decl.”) ¶¶ 6, 10, 11 & Ex. A § 13.3.¹ Facebook cited numerous cases in which courts have enforced its SRR. Dkt. No. 21, at 6–7 (citing *Soffin v. Echannel Network, Inc.*, 2014 WL 2938347, at *1–2 (S.D. Fla. June 30, 2014) (enforcing Facebook’s terms on motion to transfer venue); *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 903 (S.D. Ill. 2012) (same); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 841 (S.D.N.Y. 2012) (same); *Miller v. Facebook, Inc.*, 2010 WL 9525523, at *4 (N.D. Ga. Jan. 15, 2010) (same). Instead of opposing that motion, plaintiffs stipulated to transfer (albeit without conceding the enforceability of Facebook’s terms).

That same showing underlies the choice-of-law argument in this motion. Plaintiffs have had ample opportunity to allege facts to the contrary; but they have never tried to do so. *Not one word* in plaintiffs’ opposition to this motion—or any other filing, including the amended complaint filed after Facebook filed its transfer motion—even hints at such a denial. Unlike the parties resisting contract formation in the cases they cite (*see* Opp. 8–9), plaintiffs do not deny that they affirmatively accepted Facebook’s terms when they signed up for and used the service. Compl. ¶¶ 32, 39, 46. Nor do plaintiffs dispute that Facebook’s terms have *always* had a choice-of-law clause that selected the law of a state other than Illinois. Opp. 8–9. Instead, plaintiffs hide behind the assertion that Facebook has not met its evidentiary burden. That argument is far from sufficient to justify evading their contractual commitments. *See Tech Data Corp. v. AU Optronics Corp.*, 2012 WL 3236065, at *4 n.2 (N.D. Cal. Aug. 6, 2012) (taking judicial notice of contracts on a motion to dismiss, because the plaintiff had “contest[ed] the Court’s ability to take judicial notice of the[] documents, but ha[d] not contested the authenticity of the documents themselves”). Accordingly, the Court should enforce Facebook’s terms at the pleadings stage. Mem. 2; RJN 1–3; *see also C.M.D. v. Facebook, Inc.*, 2014 WL 1266291, at *5 (N.D. Cal. Mar. 26, 2014) (enforcing Facebook’s choice-of-law clause on a motion to dismiss), *aff’d*, --- F.

¹ *See also, e.g., Facebook, Inc. v. Fisher*, 2009 WL 5095269, at *1 (N.D. Cal. Dec. 21, 2009) (holding, on motion for TRO, that “Facebook users must register with the website and agree to Facebook’s Terms of Use”); *Facebook, Inc. v. Wallace*, 2009 WL 840391, at *1 (N.D. Cal. Mar. 24, 2009) (same on motion for preliminary injunction).

App'x ----, 2015 WL 6575724 (9th Cir. Oct. 30, 2015).

2. Facebook's SRR Is Enforceable.

Plaintiffs argue that Facebook's choice-of-law clause is unenforceable because it is part of a standard form contract. Opp. 6 & n.2. But they ignore controlling precedent: California "has no public policy against the enforcement of choice-of-law provisions contained in contracts of adhesion where they are otherwise appropriate. . . . *Nedlloyd's* analysis is properly applied in the context of consumer adhesion contracts." *Wash. Mut. Bank, FA v. Super. Ct.*, 24 Cal. 4th 906, 917–18 (2001); *see also Davis v. Md. Bank, N.A.*, 2002 WL 32713429, at *11 (N.D. Cal. June 19, 2002); Mem. 8–9.² As one court recently observed in enforcing the SRR on a motion to transfer venue, "[t]he Court cannot identify a single instance where any federal court has struck down [Facebook's] SRR as an impermissible contract of adhesion induced by fraud or overreaching." Order, Dkt. No. 26, *Franklin v. Facebook, Inc.*, No. 15-cv-655, at 4 (N.D. Ga. Nov. 24, 2015) (attached as Exhibit A to Decl. of Rebecca B. Johns).

3. Choice-of-Law Provisions Apply Equally To Statutory Claims.

Plaintiffs' argument that the SRR's choice-of-law provision is limited to contract claims and cannot apply to statutory claims (Opp. 9–10) is meritless: the terms state that California law governs "any claim that might arise"—contractual *or* statutory—between each plaintiff and Facebook. Jordan Decl. Ex. A § 15.1. Plaintiffs' BIPA claims are hardly "unrelated" to Facebook's terms (Opp. 10), which govern every aspect of plaintiffs' relationship with Facebook, including the uploading of the photographs on which their claims are based. Mem. 10 & n.7. And while plaintiffs accuse Facebook of omitting the "crucial" phrase "to govern their contractual rights and duties" from Section 187(2) of the Restatement, Opp. 10, they conveniently ignore the host of cases cited in Facebook's brief in which California and Illinois

² *See also, e.g., Song fi Inc. v. Google, Inc.*, --- F. Supp. 3d ----, 2015 WL 3624335, at *8 (N.D. Cal. June 10, 2015); *Abat v. Chase Bank USA, N.A.*, 738 F. Supp. 2d 1093, 1096 (C.D. Cal. 2010); *Hamilton v. Wells Fargo Bank, N.A.*, 2010 WL 1460253, at *2 (N.D. Cal. Apr. 12, 2010); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1269–70 (C.D. Cal. 2008); *Resurgence Fin., LLC v. Chambers*, 173 Cal. App. 4th Supp. 1, 7 (2009); *Cohen v. Chase Bank, N.A.*, 679 F. Supp. 2d 582, 595–96 (D.N.J. 2010); *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 980 F. Supp. 53, 60 (D.D.C. 1997); *Brittain v. Am. Express Inc.*, 1995 WL 812805, at *4 (S.D. Ga. Nov. 16, 1995).

1 courts have applied choice-of-law provisions to bar *statutory* claims. Those decisions include
 2 *C.M.D.*, in which Judge Seeborg enforced Facebook’s choice-of-law clause to dismiss claims
 3 under the Illinois Right of Publicity Act (2014 WL 1266291, at *5); and *Song fi*, in which Judge
 4 Conti invoked the California choice-of-law clause in YouTube’s online terms to dismiss District
 5 of Columbia consumer protection claims (2015 WL 3624335, at *8). *See also* Mem. 9 & n.6
 6 (collecting cases).³ Many of those courts quote the phrase “contractual rights and duties.”
 7 *Martin v. D-Wave Sys. Inc.*, 2009 WL 4572743, at *4 (N.D. Cal. Dec. 1, 2009); *Cardonet*, 2007
 8 WL 518909, at *3; *Sherman*, 2010 WL 3023320, at *6; *Swanson*, 77 P.3d at 442.

9 Finally, Plaintiffs’ reliance on *Fidelity Federal Bank, FSB v. Durga Ma Corp.*, 387 F.3d
 10 1021 (9th Cir. 2004), is likewise misplaced. Because 28 U.S.C. § 1961, which governs an award
 11 of post-judgment interest in all federal cases, is a generally applicable procedural rule, its
 12 application can be waived only by specific agreement to that effect. *Id.* at 1023. But no such
 13 generally applicable procedural rule is at issue here, only the question of which state’s
 14 substantive law governs the plaintiffs’ claims—a question answered by Facebook’s SRR.

15 **B. Section 187 Of The Restatement (Second) Of Conflict Of Laws Requires**
 16 **Enforcement Of The Parties’ Choice Of California Law.**

17 Plaintiffs invoke the narrow exception to enforcing choice-of-law provisions in Section
 18 187(2)(b) of the Restatement, which requires them to show *both* that application of California
 19 law “would be contrary to a fundamental policy of” Illinois *and* that Illinois “has a materially
 20 greater interest than” California in this dispute. Plaintiffs have shown neither.

21 **1.** Plaintiffs argue that by enacting the BIPA, the Illinois General Assembly made a
 22 fundamental policy choice to protect its citizens’ biometric privacy, and that application of
 23 California law would violate that policy. Opp. 3–5. But if the enactment of a statute were
 24 enough to override a choice-of-law provision, then a choice-of-law provision could never be
 25 enforced in any state with a statutory regime that varies or differs from the law of the chosen

26 ³ *See also, e.g., Langer Juice Co. v. Stonhard*, 2014 WL 346643, at *9 (C.D. Cal. Jan. 30,
 27 2014); *Century 21 Real Estate LLC v. All Prof’l Realty, Inc.*, 889 F. Supp. 2d 1198, 1217 (E.D.
 28 Cal. 2012); *Cardonet, Inc. v. IBM Corp.*, 2007 WL 518909, at *3–5 (N.D. Cal. Feb. 14, 2007);
Sherman v. PremierGarage Sys., LLC, 2010 WL 3023320, at *7 (D. Ariz. July 30, 2010);
Armstrong, 980 F. Supp. at 60; *Brittain*, 1995 WL 812805, at *4; *Swanson v. Image Bank, Inc.*,
 77 P.3d 439, 444 (Ariz. 2003); *Schroeder v. Rynel, Ltd., Inc.*, 720 A.2d 1164, 1167 (Me. 1998).

1 forum—which clearly is not the case. *See* pp. 3–4, *supra*; Mem. 7–9. Moreover, plaintiffs have
 2 made no showing that California law fails to protect privacy and related interests. *See Griffith v.*
 3 *State Farm Mut. Auto Ins. Co.*, 230 Cal. App. 3d 59, 67 (1991) (“California protects privacy and
 4 personal information in numerous ways.” (citing authorities)).

5 Plaintiffs’ assertion that the Illinois Constitution “enshrines [their] privacy rights as
 6 fundamental” (Opp. 4) rests entirely on their misleading use of ellipses. The sentence on which
 7 they rely actually states: “Every person shall find a certain remedy in the laws for all injuries
 8 and wrongs which he receives to his person, privacy, property or reputation.” Ill. Const. art. I,
 9 § 12. Plaintiffs omitted the words “person,” “property,” and “reputation” in order to suggest that
 10 the Illinois Constitution accords privacy claims a unique fundamental status; it does not. And the
 11 notion that *all* of the claims mentioned in Section 12 are exempt from choice-of-law clauses is
 12 clearly contradicted by the Illinois courts’ strong endorsement of such clauses. *See* Mem. 7–8.

13 Plaintiffs next argue that Illinois policy forbids enforcing a choice-of-law provision when
 14 the result would be to extinguish a particular cause of action altogether. But Illinois courts
 15 routinely enforce choice-of-law clauses to bar Illinois residents from asserting Illinois-specific
 16 claims and defenses. Mem. 7 & n.5 (citing cases). Plaintiffs assert that these cases involved
 17 minor differences in state law, “not a situation . . . where relief [would be] completely absent in
 18 one forum.” Opp. 5. That is false. In *Midway Home Entertainment, Inc. v. Atwood Richards,*
 19 *Inc.*, the court enforced the parties’ choice of New York law and dismissed the plaintiffs’
 20 fraudulent inducement claim outright, observing that Illinois courts enforce such clauses even
 21 where it “would deprive Illinois citizens of protection from the alleged harm and leave them *no*
 22 *recourse.*” 1998 WL 774123, at *2–3 (N.D. Ill. Oct. 29, 1998) (emphasis added). In *Potomac*
 23 *Leasing Co. v. Chuck’s Pub, Inc.*, 156 Ill. App. 3d 755, 759 (1987), the plaintiff’s claims rested
 24 on a notice-of-cancellation provision found in Illinois’ consumer protection laws but absent from
 25 Michigan’s—yet the plaintiff’s interest in obtaining relief did “not warrant overriding the parties’
 26 expressed choice of law.” And in *Mell v. Goodbody & Co.*, 10 Ill. App. 3d 809, 814 (1973), the
 27 court upheld the application of a New York choice-of-law provision even though it completely
 28 deprived plaintiffs of their usury claim under Illinois law. *See id.* at 811, 813.

1 The two Illinois cases on which plaintiffs rely (Opp. 5) are inapposite. In *Maier &*
 2 *Associates v. Quality Cabinets*, 267 Ill. App. 3d 69 (1994), the plaintiff sued under an Illinois
 3 statute that had an *explicit anti-waiver provision* stating that “[a]ny provision in any contract . . .
 4 purporting to waive any of the provisions of this Act shall be void.” *Id.* at 75 (quoting 820 ILCS
 5 120/2).⁴ BIPA, by contrast, has no anti-waiver provision. In *Brown & Brown, Inc. v. Mudron*,
 6 379 Ill. App. 3d 724, 727–28 (2008), the court held that an employer that had acquired an
 7 Illinois-based insurance agency and then sued a former Illinois employee who had gone to work
 8 for a competing Illinois agency could not avoid the restrictions Illinois places on covenants not
 9 to compete by choosing the law of a state that had rejected such restrictions. As a later decision
 10 construing *Mudron* explains, “the Illinois Supreme Court has long held that the public policy of
 11 Illinois requires a court to consider the hardship imposed on an employee in deciding whether to
 12 enforce a restrictive covenant.” *Brown & Brown, Inc. v. Ali*, 592 F. Supp. 2d 1009, 1044 (N.D.
 13 Ill. 2009) (citing *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 67 (2006); *Cockerill v.*
 14 *Wilson*, 51 Ill. 2d 179, 184–85 (1972)). Plaintiffs point to no such authority here.

15 Plaintiffs’ remaining cases discuss whether the parties’ choice of another state’s law
 16 violates the fundamental public policy of *California*—not, as relevant here, whether such a
 17 contract violates the fundamental public policy of *Illinois*. To answer that question, the places to
 18 look are the Illinois cases Facebook has cited, and that plaintiffs have failed to distinguish. *See,*
 19 *e.g., Am. Home Assur. Co. v. Stone*, 61 F.3d 1321, 1324–25 (7th Cir. 1995).

20 **2.** Plaintiffs have likewise failed to meet their burden of proving that Illinois has a
 21 materially greater interest than California in this dispute. *Nedlloyd Lines B.V. v. Super. Ct.*, 3
 22 Cal. 4th 459, 466 (1992). They scoff at, but do not respond to, Facebook’s showing that
 23 California has a strong interest in “enforcing choice of law provisions for businesses with
 24 nationwide consumers . . . to limit the risk and expenses of litigation under different laws in
 25 every state.” *Abat*, 738 F. Supp. 2d at 1096; *see also Song fi Inc. v. Google, Inc.*, 72 F. Supp. 3d
 26 53, 64 (D.D.C. 2014). Plaintiffs’ scorn is groundless: the Restatement recognizes that “the

27 ⁴ The commentary to the Restatement recognizes that a fundamental policy “may be
 28 embodied in a statute which makes one or more kinds of contracts illegal.” Restatement
 (Second) of Conflict of Laws § 187, cmt. g. The BIPA contains no such clear policy statement.

demands of certainty, predictability and convenience dictate” enforcement of choice-of-law clauses, even if one party may gain certain rights not otherwise available; or, conversely, may not be subject to laws that might otherwise apply. *See* Restatement § 187 cmt. e.⁵

II. THE ILLINOIS BIPA DOES NOT APPLY TO TAG SUGGESTIONS.

Even if plaintiffs were entitled to sue Facebook under an Illinois statute, their claims would fail: the BIPA expressly excludes from its coverage both photographs and any information derived from them. Plaintiffs’ argument that Tag Suggestions can be characterized as a “scan of hand or face geometry” is foreclosed by the BIPA’s structure, text, and history.

A. Plaintiffs’ Argument Cannot Be Squared With BIPA’s Structure.

In enacting the BIPA, the Illinois General Assembly created two categories of covered biometric data: (1) sources of information (“biometric identifiers”) and (2) the data extracted or derived from those sources (“biometric information”). In light of this structure, if data “extracted” from “user-uploaded photographs” (Compl. ¶ 4) were covered by the BIPA, it plainly would be regulated within the category of “biometric information” (Mem. 11–12). Yet plaintiffs concede that information drawn from photographs is expressly excluded from that term’s definition. *See* Opp. 2 (biometric information “is not at issue in this case”).

Plaintiffs’ reading of the statute ignores this structure, with incoherent results. They acknowledge that the term “biometric information” is “derivative information based on any of the six [biometric] identifiers.” Opp. 11 (emphasis omitted). They also agree that a “derivative data point” extracted from photographs, “like someone’s height,” is “information derived from photographs” and is thus expressly excluded from BIPA’s reach; to conclude otherwise “would make no sense.” *Id.* But they do not explain why *other* measurements derived from the same photo—such as “the distance between [the person’s] eyes, nose, and ears” (Compl. ¶¶ 22–24)—constitute a “biometric identifier” when that data cannot be declared “biometric information.”

B. The Term “Scan Of Hand Or Face Geometry” Refers To An In-Person Scan.

Plaintiffs’ entire argument rests on the fact that the definition of a “biometric identifier”

⁵ Most of plaintiffs’ cases should be disregarded because they do not involve contractual choice-of-law provisions—and thus Restatement § 187—at all. *See, e.g., Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012); *Pokorny v. Quixtar, Inc.*, 601 F.3d 987 (9th Cir. 2010).

1 includes a “scan of hand or face geometry.” That reliance is ill-founded: that term refers to a
 2 *live* scan of a person’s *actual* hand or face, typically for verification or security purposes—not
 3 the application of facial recognition software to a user-uploaded photograph. Mem. 12–13. This
 4 reading construes the term “scan of . . . face geometry” consistently with the other biometric
 5 identifiers enumerated in the statute—scans of hand geometry, retina or iris scans, fingerprints,
 6 and voiceprints (740 ILCS 14/10). *See Puritan Fin. Corp. v. Bechstein Constr. Corp.*, 366 Ill.
 7 Dec. 335, 339 (Ill. App. Ct. 2012) (“a word is known by the company it keeps”) (quotation
 8 marks omitted). It also is the only way to harmonize the statute’s express *exclusion* of
 9 photographs and information derived from photographs, on the one hand, with its *inclusion* of
 10 “scan[s] of . . . face geometry.”

11 Plaintiffs’ responses are meritless. They start by arguing that Facebook’s argument
 12 proves too much because “virtually all biometric identifiers are based in the first instance on
 13 photographs.” Opp. 12–13. That proposition is wrong in three key respects. First, the scans
 14 listed in the definition of biometric identifier all involve the physical capture of information from
 15 the human body itself. A fingerprint is produced when a live person touches a card, console, or
 16 other object with his or her finger.⁶ A retina scan takes place when a live person holds up his eye
 17 to a specialized machine—as plaintiffs’ own sources confirm.⁷ And a voiceprint is the product
 18 of a live person’s spoken words.⁸

19 Second, although these live scans may produce an image that is then saved for later use,
 20 that image is instantaneously captured by a *specialized recording device as part of the scan itself*.
 21 Most notably, in a “scan of hand geometry,” a person’s actual hand “is placed on [a] plate, palm

22 ⁶ *See* FBI, *Recording Legible Fingerprints*, [https://www.fbi.gov/about-us/cjis/fingerprints_](https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/recording-legible-fingerprints)
 23 *biometrics/recording-legible-fingerprints* (last accessed Nov. 23, 2015) (“Fingerprints can be
 24 recorded utilizing” either with ink on a “standard fingerprint card” or “electronically using a *live*
 25 scan device”) (emphasis added).

26 ⁷ *See, e.g.*, Opp. Ex. 1 (Nguyen Decl.) Ex. 1-B at 1 (retina scan uses a camera to “project[]
 27 an infrared beam of light into your eyes” and then, based on “the reflection of the light from your
 28 retinas and choroids,” to capture an image of “the vasculature structure of your eyes”).

⁸ *See* Lisa Myers, *An Explanation of Voice Biometrics*, SANS Institute, at 4 (July 24,
 2004), [https://www.sans.org/reading-room/whitepapers/authentication/exploration-voice-](https://www.sans.org/reading-room/whitepapers/authentication/exploration-voice-biometrics-1436)
biometrics-1436 (last accessed Nov. 23, 2015) (in a voice authentication system, “[t]he user is
 asked to speak a certain set of words or phrases, or to speak for a certain length of time,” and
 “[f]rom that sample, a digital representation of the voice, called a voiceprint, is created”).

1 down, and guided by five pegs that sense when the hand is in place.” National Science and
2 Technology Council, Subcommittee on Biometrics, *Hand Geometry* (Aug. 7, 2006), [http://www.](http://www.biometrics.gov/documents/handgeometry.pdf)
3 [biometrics.gov/documents/handgeometry.pdf](http://www.biometrics.gov/documents/handgeometry.pdf) (last accessed Nov. 23, 2015). A camera
4 “capture[s] a silhouette image of the hand” as part of the scanning process. *Id.* And third, these
5 scans are *sources* of information, not the derivative product of analyzing such a source—which
6 is why they are regulated as biometric identifiers and not biometric information.

7 The operation of Tag Suggestions has nothing in common with those scans. First of all, it
8 does not involve the live capture of an image of a person’s actual face. Facebook does not take
9 any images at all, specialized or otherwise. Instead, a person takes a picture and then, at some
10 point later, he or she might voluntarily upload it to Facebook. Mem. 3–4. Second, Tag
11 Suggestions does not involve a specialized recording device; it is based on ordinary photos taken
12 by ordinary people every day. Even plaintiffs do not assert that a “scan of hand geometry” can
13 be obtained by analyzing an ordinary photo of someone’s hand; therefore, the parallel statutory
14 term “scan of face geometry” cannot mean something obtained by analyzing an ordinary photo
15 of someone’s face. And third, the “templates” on which plaintiffs’ claims rest are *derived* from
16 those ordinary photos; a template is nothing more than “information derived from photographs,”
17 which is specifically excluded from the statute altogether.

18 Plaintiffs next argue that a “scan of hand or face geometry” cannot possibly refer to an in-
19 person scan because the statutory term “biometric identifier” refers solely to objects, and not
20 processes. Opp. 14. This argument is foreclosed by the plain text of the statute: “[b]iometric
21 information does *not* include information derived from items *or procedures* excluded under the
22 definition of biometric identifiers.” 740 ILCS 14/10 (emphasis added). Thus, “biometric
23 identifiers” include (and exclude) not just “items,” as plaintiffs assert, but “procedures” as well.

24 Finally, raising fears of illicit surveillance and wiretapping, plaintiffs contend that
25 reading the statutory phrase “scan of hand or face geometry” to require a live, physical scan of a
26 person’s actual hand or face produces “absurd results.” Opp. 14. But contrary to plaintiffs’
27 reimagining of the statute, BIPA was not designed as an all-purpose privacy statute covering
28 wiretaps; nor did it need to be, given that Illinois already *criminalizes* wiretapping. *See* 720

1 ILCS 5/14 *et seq.* Moreover, there is nothing absurd about the Illinois legislature’s focus on in-
 2 person “security screenings” and “biometric-facilitated financial transactions, including finger-
 3 scan technologies at grocery stores, gas stations, and school cafeterias.” 740 ILCS 14/5(a)–(b).
 4 The legislature was concerned that additional regulation was needed to facilitate further
 5 innovation in, and public use of, “biometric identifier-facilitated transactions.” *Id.* at 14/5(e).

6 C. The Legislative History Of The BIPA Contradicts Plaintiffs’ Interpretation.

7 Plaintiffs have virtually no response to Facebook’s discussion of the legislative history
 8 (Mem. 14–15), which shows that the definitions of “biometric identifier” and “biometric
 9 information” were sharply narrowed as the bill progressed towards passage. The Illinois General
 10 Assembly specifically *rejected* a proposed expansion that would have included “records or scans
 11 of . . . facial recognition” within the definition of “biometric identifier”; narrowed that definition
 12 from an open-ended set of “indelible personal physical characteristic[s]” to a narrowly-cabined
 13 list of enumerated sources; and removed from that definition the term “records” and left only the
 14 narrower term “scan.” *Id.* (citing RJN Exs. 3–6).⁹ Plaintiffs merely deride these changes as
 15 “technical language variations.” Opp. 15. But the changes cannot be swept so easily under the
 16 rug. The legislative history overwhelmingly supports the conclusion that the BIPA does not
 17 cover the application of facial-recognition technology to photographs uploaded to Facebook.

18 CONCLUSION

19 The consolidated amended complaint should be dismissed with prejudice.

20 Dated: November 24, 2015

MAYER BROWN LLP

21 By: /s/ John Nadolenco

22 John Nadolenco

23 Lauren R. Goldman

24 Archis A. Parasharami

Counsel for Defendant Facebook, Inc.

25
 26 ⁹ The BIPA’s unanimous passage by both houses of the Illinois General Assembly without
 27 extended debate (*see* Opp. 15) *undermines* plaintiffs’ position: if the statute actually did impose
 28 sweeping regulation of online photo-tagging services, it surely would have generated more
 “questions” and “deliberation.” *Id.* And its exclusion of many financial institutions (*see id.* at 15
 & n.8) only confirms that BIPA is a narrow statute focused on specific issues.